

**BEFORE THE SECRETARY OF STATE
STATE OF COLORADO**

CASE NO. OS 2002019

AGENCY DECISION

**IN THE MATTER OF THE COMPLAINT FILED BY KEVIN SKRUCH
REGARDING ALLEGED VIOLATIONS OF THE FAIR CAMPAIGN
PRACTICES ACT ON THE PART OF THE HIGHLANDS RANCH
METROPOLITAN DISTRICTS NOS. 1 THROUGH 5.**

Hearing in this matter was held February 19, 2003 at the Division of Administrative Hearings in Denver. Kevin Skruch, who is not an attorney, represented himself. David Hahn, Esq., represented the Respondent Highlands Ranch Metropolitan Districts Nos. 1 - 5 ("Metro Districts").

ISSUES PRESENTED

In this case, the Complainant alleges that the Metro Districts made expenditures of public money in favor of a local ballot issue as proscribed by Section 1-45-117(1)(a)(I)(B), C.R.S. of the Fair Campaign Practices Act after the August 27, 2002. That is the date the local ballot issue in question was submitted for the purpose of having a title fixed pursuant to Section 31-11-111, C.R.S.

FINDINGS OF FACT

Based upon the evidence presented at the hearing, the ALJ finds as fact:

1. On August 22, 2001, the Metro Districts held a survey and bond election planning meeting to propose the funding of various community amenities. One of the purposes of the meeting was to identify "allies and enemies:" those who would support and those who would oppose these amenities.

2. At a November 11, 2001 Metro Districts meeting, Hahn proposed forming an authority to conduct a bond election to allow Highlands Ranch residents to vote to pass a bond to support these amenities.

3. In March 2002, the Metro Districts worked on setting up a Blue Ribbon Panel also known as "Enhance the Ranch." Members of the Panel were to be citizens of Highlands Ranch who would support these community amenities.

4. In July of 2002, the Metro Districts sent by mail a color brochure titled "Enhance the Ranch Report to the Community" to addressees in Highlands Ranch, including Skruch. (Exhibit C and H4.) The brochure contained the logos for "Enhance the Ranch" and the Metro Districts. The brochure described four projects: 1) a Civic Green Park and Cultural Center, 2) a Senior Center, 3) a Highlands Ranch Historic Park and Mansion, and 4) Wildcat Regional Park. The projects were described in the brochure with photographs, drawings and maps

5. The brochure was entirely a positive description of the four projects. The brochure contained no argument against the projects. In addition to the description of each of the four projects, the brochure contained the following narrative:

How was the Enhance the Ranch vision born? In May 2001, the Metro Districts Board of Directors, met to discuss their vision for the future of Highlands Ranch. They imagined the heart of the community in the downtown core with a Civic Green Park and Cultural Center to attract families to events, shopping and concerts. They looked to the historic Highlands Ranch Mansion and ranch as the soul of our community. They also saw a special place for seniors to gather and socialize, learn and enjoy community activities. The Metro Districts Boards are also exploring a partnership with Douglas County to accelerate the development of Wildcat Regional Park. *The Enhance the Ranch Committee recommended that the Metro Districts hold a bond election to provide funds for these projects.* [Emphasis added.]

6. The brochure also stated that citizens had been invited to participate in a series of public workshops from April through July 2002. The brochure said that ideas from these workshops were used to develop master plans for the Enhance the Ranch projects, and that Enhance the Ranch Committee members participated in these workshops to hear ideas and provide input.

7. One portion of the cost of the July 2002 brochure was \$975 for graphic services. The Metro Districts received an invoice dated August 12, 2002 for this amount. The Metro Districts paid this bill with public money along with another expense by check dated August 29, 2002.

8. The Metro Districts received an invoice dated August 21, 2002 for \$2,910 for printing services related to the creation of the July 2002 brochure. The Metro Districts paid this bill with public money by check dated September 13, 2002.

9. The Metro Districts received an invoice dated August 31, 2002 for \$292 for mailing the July 2002 brochure. The Metro Districts paid this bill with public money by check dated October 25, 2002.

10. There is no evidence in the record as to when, if ever, a contractual agreement determining the amount to be paid was established for the graphic services, the printing services or the mailing, for which the above three checks were issued.

11. The Metro Districts also had prepared "vision boards" or posters with thick backing for display, at a cost of \$5,200. These vision boards described the four projects and contained many of the same photos and drawings as the brochure. There is no precise evidence as to when the vision boards were paid for by the Metro Districts. The vision boards, like the brochure, were positive descriptions of the projects and contained no arguments against them.

12. A proposal to issue bonds to pay for the four projects listed in the July 2002 brochure became local ballot issue 5A at the November 5, 2002 election for Highlands Ranch voters.

13. On September 26, 2002, "Citizens for Enhance the Ranch" filed with the Colorado Secretary of State a Committee Registration Form as described in Section 1-45-109, C.R.S. Citizens for Enhance the Ranch identified itself as an issue committee as defined at Section 1-45-103(8), C.R.S. The purpose of the issue committee was to support the passage of local ballot issue 5A.

14. The vision boards were given to issue committee Citizens to Enhance the Ranch sometime after August 27, 2002. The vision boards were displayed at public places in Highlands Ranch at least in the months of September and October 2002.

15. As of October 13, 2002, issue committee Citizens for Enhance the Ranch had a website that contained logos, photographs, drawings and diagrams that had appeared in the July 2002 brochure and on the vision boards. The website contained descriptions of the above four projects and the Metro Districts provided to issue committee Citizens for Enhance the Ranch, 14 of the photographs on the website free of charge. The photographs have the value of approximately \$50 apiece, totaling approximately \$700. The evidence is unclear if these photos were taken as part of the creation of the brochure and vision boards, or were in the possession of the Metro Districts before that time.

16. Although the logos, drawings and diagrams have some value, the evidence is unclear as to what that value is. There is no evidence that the Metro Districts spent money for these logos, photographs, drawings and diagrams after August 27, 2002.

17. There is no evidence of previous violations of the Fair Campaign Practices Act on the part of the Metro Districts.

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CONCLUSIONS OF LAW

1. Section 1-45-117(1)(a)(I), C.R.S. provides in pertinent part:

No . . . political subdivision [of the state] shall . . . expend any public moneys from any source, or make any contributions, to urge electors to vote in favor of or against any:

(B) Local ballot issue that has been submitted for the purpose of having a title fixed pursuant to section 31-11-111 or that has had a title fixed pursuant to that section;

2. The Metro Districts admit in their answer filed November 21, 2002 with the Division of Administrative Hearings that they are political subdivisions of the state.

3. The Metro Districts also agree that August 27, 2002 is the date the ballot title was fixed by resolution of the Metro Districts. *See* the Metro District's request for a more definite statement dated October 17, 2002 as well as the Metro Districts' Partial Motion to Dismiss filed November 21, 2002. This is a judicial admission. *See Kempter v. Hurd*, 713 P.2d 1274, 1280 (Colo. 1996).

The Three Checks

4. The August 29, September 13 and October 25 checks were all expenditures of public money to pay for the brochure. The brochure was an entirely positive description of the four projects that were to be paid for by the passage of local ballot issue 5A. The brochure commented on the fact that citizen input was used to develop master plans for the Enhance the Ranch projects. No arguments against the projects appeared in the brochure. As a positive document, the brochure had the effect of encouraging Highlands Ranch residents to support the four projects. The brochure specifically mentioned a "bond election to provide funds for these projects." Local ballot issue 5A was that bond election. The brochure therefore urged electors to vote in favor of 5A. The three checks for expenses related to the creation of the brochure were issued after the August 27, 2002 date that 5A was submitted for the purpose of having a title fixed pursuant to section 31-11-111, C.R.S. Consequently, each of these three checks constitutes an expenditure of public money to urge electors to vote in favor of 5A. Each check constitutes a violation of Section 1-45-117(1)(a)(I)(B), C.R.S.

5. It is true, as argued by the Metro Districts, that the brochure does not mention ballot issue 5A. The brochure was sent out in July and 5A was submitted for the purpose of having a title fixed in August. However, the language of Section 1-45-117(1)(a)(I), C.R.S. does not require this level of specificity to prove a violation. The language prohibits the urging of electors to vote a certain way. As a positive description without any argument against the projects, the brochure had the effect of urging electors to vote in favor of 5A.

6. The Metro Districts also argue that they did not "expend any public moneys" by the issuance of the three checks. They rely on the definition of "expenditure" that appears at Section 1-45-103(6), C.R.S. That definition states that an "expenditure occurs when the actual payment is made or when there is a contractual agreement and the amount is determined." The Metro Districts argue that there was a contractual agreement and the amount was determined sometime prior to the issuance of the brochures in July of

2002. The definition of "expenditure" at Section 1-45-103(6) applies only to payments by any "candidate committee, political committee, issue committee, or political party." Political subdivisions of the state such as the Metro Districts are not included. The ALJ therefore concludes that the definition of "expenditure" in Section 1-45-103(6) does not apply to political subdivisions of the state such as the Metro Districts.

7. Even if the ALJ were to agree that the "expenditure" definition at Section 1-45-103(6), C.R.S. did apply to the Metro Districts, this would not amount to a defense. The definition of expenditure uses the word "or:" "An expenditure occurs when the actual payment is made **or** when there is a contractual agreement and the amount is determined." [Emphasis added.] The Metro Districts argue that if the contractual date is before the August 27, 2002 date, then later payments based on that contract do not run afoul of Section 1-45-117(1)(a)(I). But the use of the word "or" in Section 1-45-103(6) is designed to reach *both* circumstances, *i.e.* when the payment is made *or* when there is a contractual agreement. Therefore, even if the definition of expenditure at Section 1-45-103(6) were to apply to the Metro Districts, the "when the actual payment is made" language would put it in violation of Section 1-45-117(1)(a)(I) in the case of the three checks.

8. Finally, there is no evidence in this case when a contractual agreement determining the amount to be paid, if any there was, was made for the services for which the three checks were paid.

The Vision Boards and Website Material

9. Complainant argues that the vision boards had a value equal to the \$5,200 they cost to make and that the 14 photographs had a value of approximately \$700. As the vision boards were displayed after August 27, 2002, and as the photographs appeared in issue committee Citizens for Enhance the Ranch's website in October, they were "contributions" in violation of Section 1-45-117(1)(a)(I)(B), C.R.S., argues the Complainant. The Metro Districts respond that these are not "contributions," but are "contributions in kind." Only "contributions" and not "contributions in kind" are prohibited by Section 1-45-117(1)(a)(I)(B), say the Metro Districts. The ALJ agrees.

10. Both terms are defined by the Fair Campaign Practices Act. "Contribution" means the "payment, loan, pledge, or advance of money, or guarantee of a loan, made to any candidate committee, issue committee, political committee, or political party." Section 1-45-103(4)(a)(I), C.R.S. None of these examples describe the use of the vision boards and the website material. Section 1-45-103(4)(a)(IV) provides that a "contribution" is "anything of value given, directly or indirectly, to a candidate for the purpose of promoting the candidate's nomination, retention, recall, or election." Note that this language applies only to a candidate and not to an issue committee. Section 1-45-103(4)(a)(III) *formerly* prohibited the contribution of "anything of value" to an issue committee. However, that language was eliminated in 2000. 2000 Colo. Sess. Laws 122. Therefore, the ALJ concludes that the display of the vision boards and the use of the photographs by issue committee Citizens for Enhance the Ranch is not a "contribution."

11. A "contribution in kind" means "the fair market value of a gift or loan of any item of real or personal property, other than money, made to or for any candidate committee, issue committee, political committee, or political party for the purpose of

influencing the passage or defeat of any issue" The ALJ concludes that the "contribution in kind" language describes the use of the vision boards and website material. But, as argued by the Metro Districts, the language "contribution in kind" does not appear in Section 1-45-117(1)(a)(I), only the language "contribution" does.

12. The "contribution in kind" language *did* appear in the version of Section 1-45-117(1)(a)(I), C.R.S. that existed prior to the repeal and reenactment of this section by initiative in 1996. A section similar to the current Section 1-45-117(1)(a)(I) was formerly numbered as Section 1-45-116 prior to the repeal and reenactment. The Metro Districts rely on *People v. McCullough*, 6 P.3d 774 (Colo. 2000) and *Common Sense Alliance v. Davidson*, 995 P.2d 748 (Colo. 2000) to argue that it can be presumed the voters knew the existing law and that there is a presumption they intended to change it by eliminating the "contribution in kind" language. The Metro Districts also note that the presumption can be rebutted by showing the change was meant to clarify an ambiguity. *Corsentino v. Cordova*, 4 P.3d 1082 (Colo. 2000). Curiously, the Metro Districts argue that such an ambiguity existed, which undermines their argument that the voters intended to eliminate the prohibitions on "contributions in kind."

13. In any case, an ALJ is to look first to the language of a statute in order to determine its meaning. Words and phrases are to be given their plain and ordinary meaning. *Colorado Common Cause v. Meyer*, 758 P.2d 153, 160 (Colo. 1988). The "contribution in kind" language does not appear in Section 1-45-117(1)(a)(I). Therefore, the "contribution in kind" of allowing issue committee Citizens for Enhance the Ranch to use the vision boards and photographs on its website does not violate Section 1-45-117(1)(a)(I).

14. Any expenses for the vision boards, the 14 photographs or the logos, diagrams and drawings are also not violations of Section 1-45-117(1)(a)(I) on the independent theory they constitute an expense of "any public money." There is no evidence that the Metro Districts made expenses for these items after August 27, 2002.

Sanction

15. The three checks expending public money to urge electors to support local ballot issue 5A constitute violations of Section 1-45-117(1)(a)(I)(B), C.R.S. Section 1-45-117(4) provides that any violation of Section 1-45-117 may be sanctioned as authorized in Section 1-45-113 or by any appropriate order or relief. The Complainant seeks the imposition of a fine in an amount to be set in the discretion of the ALJ.

16. Section 1-45-113(1) provides for a criminal penalty for a violation of Section 1-45-117. The ALJ lacks jurisdiction to impose a criminal penalty.

17. Section 1-45-113(2) provides for the imposition of a civil penalty of double the amount contributed in the case of a violation relating to "contribution limits." The contribution limits are set out at Section 1-45-105.3, C.R.S. and have no application to this case. The ALJ concludes that no sanctions are available in Section 1-45-113 for a violation of the prohibition on the expense of public money by a political subdivision of the state as proscribed by Section 1-45-117(1)(a)(I)(B).

18. However, the clause "any appropriate order or relief" in Section 1-45-117(4) does authorize the imposition of fines for a violation of Section 1-45-

117(1)(a)(I)(B). Therefore, the ALJ imposes a fine of \$100 for each of the three checks issued after the August 27, 2002 cutoff date for a total fine of \$300. A larger fine is not appropriate in that the conduct complained of constitutes misuse of public money. To impose a large fine to punish this misuse would aggravate the violation, as it would be the citizens of Highlands Ranch who would ultimately be called upon to pay the fine. Also, there is no evidence the Metro Districts have previously violated the Fair Campaign Practices Act.

AGENCY DECISION

Therefore, the ALJ imposes a fine against the Metro Districts in an amount of \$300. The fine shall be paid to the Secretary of State and shall be deposited in the Department of State cash fund created in Section 24-21-104(3), C.R.S. This Agency Decision is a final decision of the Secretary of State and is subject to review by the Court of Appeals, pursuant to Section 24-4-106(11), C.R.S. Section 1-45-111(2)(a), C.R.S.

DONE AND SIGNED

May ____, 2003

MATTHEW E. NORWOOD
Administrative Law Judge

Tape nos. 3061 and 3062
Exhibits admitted: A through G, H1 through H13, R1-17
Exhibits not admitted: H15
Exhibits withdrawn: H14.

CERTIFICATE OF SERVICE

I hereby certify that I have mailed a true and correct copy of the above **AGENCY DECISION** by placing same in the U.S. Mail, postage prepaid, at Denver, Colorado to:

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